

# News with Clout

Providing Corporate & Personal Solvency Solutions

## **UNFAIR PREFERENCES UNCOVERED STEP 2**

In our last newsletter we covered the nuts and bolts of Preferences with particular focus on companies and touched on areas of defenses if faced with a demand from a liquidator to reimburse what he or she claims to be an unfair preference.

Whilst we are accountants and not lawyers as you can appreciate in an insolvency practice there is some familiarity with the litigation process. This month we touch on some commercial realities of litigation and how that impacts behind the scenes as to a liquidator's decision whether or not to embark upon the legal process despite threats made to do just that.

Generally litigation is expensive particularly if you are unsuccessful and suffer a costs order against you for the other side's legal costs. That is nearly 2 times the costs to cover. Whilst there is no personal liability on a liquidator for an adverse costs order, unless there has been established an abuse of the legal process, a liquidator if faced with limited funds will be reluctant to brief lawyers unless he has found someone who is prepared to take the matter on a speculative basis.

This does happen but is not frequent. To get a feel for a liquidator's fighting fund if you are still a creditor then you will have received a summary of affairs on a voluntary liquidation and for a court job, you can more often than not, search for the Report As to Affairs on the ASIC database and if six months have expired the Form 524 will show you how much funds were on hand at the time, how much remuneration has been taken in that period and extrapolate from what is there. You may also have had a copy of the report to creditors' as well.

Now even if there is success and a costs order there is often a significant shortfall between the amount of fees in a cost order and the actual cost to the plaintiff or defendant, which has to be funded by the liquidation. In addition unless there are inadequate company books and records pursuant to Section 286, and therefore the presumption of insolvency applies under Section 588E, the liquidator needs to be able to establish when the company became insolvent and prove it in a comprehensive report to the court. There is often the use of an independent expert witness.

Therefore if the amount chased is not large and I would estimate up to \$80,000 to \$100,000 then litigation is unlikely to ensue.

What to do, hang tough, claim good faith and no knowledge. If a lawyer gets involved for a liquidator consider settling if the sum is large or play hardball until the lawyer's enthusiasm for speculative litigation wanes. Although it is all a gamble.

Time spent on small litigation by a liquidator is more often the same as that on a big litigation. The same facts need to be established and the same tactics and decisions need to be made. The amount of time spent is the same the risk the same but the potential reward for creditors is significantly higher in bigger claims.

Be aware of the possibility of litigation insurance for significant claims which only really start at high six figures. The practical implications of this is that two sets of lawyers have made their own assessment of the merits of the case, which may but not always indicates that the case is a good one. It means the liquidator's costs are covered so he does not have the same kind of fee or cashflow pressure and any application for security for costs will likely just enable funds to be placed in court rather than have the litigation frustrated for want of sufficient funds to cover such security for costs. Whilst not a fait-acompli some times if you are aware the funds are limited such an application can kill off litigation on the vine.

In addition to having a reasonable case the decision to actually embark on litigation by a liquidator must, notwithstanding the usual risk of litigation, also be grounded in good commercial sense. That means the difference between full indemnity costs and any costs order on a party and party basis must be covered by the litigation as well as the liquidator's costs of proving insolvency and managing the litigation process. It is also becoming established that judges frown on liquidators who are only chasing preferences just to cover their fees which is well worth remembering.

As ever we welcome all your enquiries and would like to thank the professionals in this region for your ongoing support